Supreme Court, U.S.
FILED
DEC 30 1982
ALEXANDER L. STEVAS
CLERK

No. 82-919

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

CITY OF PHILADELPHIA; ROBERT W. CRAWFORD, COMMISSIONER, DEPARTMENT OF RECREATION OF THE CITY OF PHILADELPHIA; NATHANIEL WASHINGTON, ACTING COMMISSIONER, DEPARTMENT OF RECREATION OF THE CITY OF PHILADELPHIA,

Petitioners

v.

MICHAEL TACYNEC, JAMES MCDONALD AND NORTHEAST PHILADELPHIA STRING BAND, INC.
and
RUSSELL J. GEISER AND SOUTH JERSEY STRING BAND, INC.,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION
MICHAEL TACYNEC, JAMES MCDONALD AND NORTHEAST PHILADELPHIA STRING BAND, INC.
and
RUSSELL J. GEISER AND SOUTH JERSEY STRING BAND, INC.,

Respondents

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COUNTER-STATEMENT OF THE QUESTION PRESENTED.

Should review be granted where the Court of Appeals remanded the case to the District Court for factual findings which may remove the basis of Petitioner's petition and which have to be made to resolve this case regardless of any action taken by this Court at this time?

TABLE OF CONTENTS

	Page
Counter-Statement of the Question Presented ...	i
Counter-Statement of the Case	1
Reasons Why the Writ Should Be Denied	4
I. Because the Court of Appeals Has Remanded This Case to the District Court for Fact Finding on Two Issues, Review of Only One of Those Issues Before the District Court Renders Its Decision on That Issue is Premature and May Result in Unnecessary Adjudication of a Constitutional Question.	
II. The City Has Failed to Assert Any Reason for a Writ of Certiorari To Be Granted Because the Court of Appeals in Reviewing the City's Alleged Time, Place, and Manner Restriction on Participation of String Bands in the Mummer's Parade Applied the Adequate Alternative Forum Standard Which Has Been Mandated by the Supreme Court.	
Conclusion	13

TABLE OF AUTHORITIES

Cases Cited:	Page
Black v. Cutter Laboratories, 351 U.S. 292 (1956)	7
Firemen v. Bangor & A. R. Co., 389 U.S. 327 (1967)	4
Heffron v. International Society for Krishna Consciousness, 452 U.S. 640 (1981)	9
Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. (1977)	7, 10
Metromedia Inc. et al v. City of San Diego et al, 453 U.S. 490 (1981)	8, 10
Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981)	9
Sweatt v. Painter, 339 U.S. 629 (1950)	5
United States Constitution Cited:	
Amendment I	Passim

COUNTER-STATEMENT OF THE CASE

Every New Years Day or designated rain date since 1901, Broad Street, the City of Philadelphia's (hereinafter referred to as the "City") main thoroughfare, has been reserved for the Mummers Parade (hereinafter referred to as "parade"). The parade is sponsored and administered by the City and features several thousand marchers in four categories: string bands, fancies, brigades, and comics, each performing distinctive Mummers music or drill while attired in Mummers costumes. During the 1950s, the number of string bands in the parade varied, with twenty-five bands marching in both 1950 and 1952. The parade ended earlier during those years than it has during the past five years. (Uncontested Facts 59 and 60). The number of string bands in the parade declined to twenty-two during the 1950s. While no written rules required the exclusion of new bands from the parade, the City observed an "unwritten rule" limiting string bands to twenty-two.

In 1977, the Juniata Park String Band was admitted as the twenty-third string band after consultations between the City's Recreation Commissioner and the established string bands. It is acknowledged by the City that the decision to admit Juniata Park String Band was made because of a threat by a City official to terminate City funds for the parade if the unit was not admitted. (Uncontested Facts 17 and 18).

Michael Tacynec formed the Northeast Philadelphia String Band, Inc. (hereinafter referred to as "Northeast") in February, 1980. (Uncontested Fact 43). Northeast applied for inclusion in the parade in May, 1980, and received no response until August, 1980, when it was invited to a String Band Division meeting chaired by the Recreation Commissioner at which its representatives were interrogated concerning the number of Northeast members who were formerly members of "established" string bands which marched in the parade.

The established string bands voted to exclude Northeast. The Commissioner refused Northeast admission to the parade. Northeast instituted the present action and requested a preliminary injunction.

At the preliminary injunction hearing on December 16, 1980, Recreation Commissioner Robert W. Crawford testified that a purpose of the "unwritten rules" barring the admission of new string bands was to prevent members of established string bands from breaking away from existing string bands to form new ones. (Uncontested Fact 77). The District Court granted a preliminary injunction compelling admission of Northeast to the 1981 parade. The Court's decision rested on findings of violations of due process and of the First Amendment. The Court held that the City had engaged in ad hoc decision making in admissions and had not applied objective standards as required by the First Amendment.

On January 16, 1981, Russell J. Geiser, the President of South Jersey String Band, Inc. (hereinafter referred to as "South Jersey"), applied for admission to the 1982 parade on behalf of South Jersey. The City never responded to this application. On June 6, 1981, South Jersey instituted an action for a permanent injunction. That action was consolidated with Northeast's pending action for a permanent injunction. It is undisputed that the members of Northeast and South Jersey are artistically competent to participate in the parade and that their performances and music are of the type presented in the parade. (Uncontested Facts 27, 28, 73).

As of June 24, 1981, the date of the pre-trial conference, the City had not promulgated any written rules concerning the admission of new units to the parade. The City agreed to promulgate such rules by July 10, 1981. The rules were formally issued on July 10, 1981 by acting Deputy Recreation Commissioner Joseph Brogan. Mr. Brogan testified that recently retired Recreation

Commissioner Robert W. Crawford was the major force in drafting the rules. It is stipulated that the reason Crawford sought the new rules was to foster the policies of the unwritten rules. (Uncontested Fact 76). The rules of July 10, 1981 prohibited any string band, which had not marched in the 1980 parade from participating in the 1982 parade.

The District Court granted a permanent injunction permitting South Jersey and Northeast to participate in the 1982 parade on the grounds that the City's rules were not the least restrictive means of limiting the time of the parade. The District Court did not rule on the freedom of association claims of South Jersey and Northeast.

On appeal, the United States Court of Appeals for the Third Circuit in an opinion by Judge Arlin M. Adams decided that the District Court had incorrectly used the "least restrictive" test and was instead required to use the "adequate alternative forum" test and remanded the case for fact finding. In addition, the Court of Appeals directed the District Court to make findings on the separate issue of whether the City's motive in adopting the parade admission rules was the impermissible one of preventing established string band members from transferring to new string bands and consequently in violation of the freedom of association guarantee of the First Amendment of the United States Constitution. As soon as this matter was remanded to the District Court, the City advised the District Court of its intention to seek certiorari and did so on December 1, 1982, preventing the District Court from making the factual findings necessary to resolve this case.

REASONS WHY THE WRIT SHOULD BE DENIED

I. Because the Court of Appeals has Remanded this Case to the Distict Court for Fact Finding on Two Issues, Review of Only One of Those Issues Before The District Court Renders its Decision on That Issue is Premature and May Result in Unnecessary Adjudication of a Constitutional Question.

The Court of Appeals remanded this case to the District Court for factual findings on whether an adequate alternative to the Mummers Parade exists and on whether the City's rules excluding string bands which had not marched in the 1980 parade from future parades were motivated by the impermissible purpose of protecting the traditional string bands and preventing the formation of competing string bands. (A-16, A-17, A-20). Cases remanded for fact finding are not ripe for review by this Court. *Firemen v. Bangor & A.R. Co.*, 389 U.S. 327, 328 (1967).

The City seeks review of the adequate alternative forum standard before the District Court has made essential factual findings. That question is premature since the District Court may find that an adequate alternative forum is available.

The Court of Appeals did not direct the District Court to determine if a parade equivalent to the Mummers Parade is available to South Jersey and Northeast. Instead the Court of Appeals in accordance with the decisions of this Court required the City to prove that an adequate alternative forum exists for South Jersey and Northeast. The District Court has not ruled on this matter. (A-16, A-17). The Court of Appeals suggested that in deciding that issue,

> . . . the district court may wish to consider factors such as the size of the audience, the prestige of an alternate parade, and the relative ability of another audience to appreciate the plaintiffs' expressive

message. Of course, no one of these factors is necessarily determinative. (A-16)

The Court of Appeals opinion permits the District Court to consider or ignore each of these factors as it deems appropriate. Even if these factors are considered the Court of Appeals specifically noted that they are not determinative of the alternative forum issue. The decision of the District Court is not a foregone conclusion.

Reserving review until the District Court makes its factual findings on the improper motivation question may remove the need to address the adequate alternative forum standard. The federal courts do not decide constitutional questions unless such a decision is required to determine the case. *Sweatt v. Painter*, 339 U.S. 629 (1950). If South Jersey and Northeast prevail on the improper motivation question on remand, no reason would exist to review the adequate alternative forum standard since South Jersey and Northeast would be entitled to admittance to the Mummers Parade even if there is an adequate alternative forum and even if the City's regulations are valid time, place, and manner restrictions. This is the only relief they seek. The City has not challenged the legal standard that the Court of Appeals directed the District Court to apply on remand to determine the improper motivation issue.

II. The City Has Failed to Assert any Reason for a Writ of Certiorari to be Granted Because The Court of Appeals in Reviewing the City's Alleged Time, Place, and Manner Restriction on Participation of String Bands in the Mummers Parade Applied the Adequate Alternative Forum Standard Which has been Mandated by The Supreme Court.

South Jersey and Northeast seek to compete as string bands in the parade on New Year's Day on Broad Street. The City has restricted participation in the string band section of the parade to those bands which played

in the 1980 parade. This denies South Jersey and Northeast the right to participate in the parade because they did not march in 1980. The rules issued by the City on July 10, 1981 to govern which units may march in the 1982 parade restrict participation in the parade to those which marched in the 1980 parade. New units will be permitted to join the parade only when units who were in the parade in 1980 indicate that they no longer wish to participate in the parade or are disqualified from the parade for two consecutive years. In the last twenty years, no unit that has participated in the parade has ever indicated it would not march in future parades. In the last twenty years, no unit which has previously marched in the parade has been prevented from marching in future parades even when it has failed to march in the preceding parade. These rules create a monopoly for the units which marched in the 1980 parade. Under this system no new unit is likely to be admitted to the parade for years, if ever. An entire generation of individuals will be denied the opportunity to participate in the parade in new units.

The City defends this restriction by contending that it is a legitimate time, place, and manner regulation of the First Amendment expression of South Jersey and Northeast. The District Court invalidated the City's rules contending that the time, place and manner regulations had to be the least restrictive means possible to achieve the City's legitimate governmental interests. The City appealed the District Court's decision to the United States Court of Appeals contending that the appropriate standard was whether or not an adequate alternative forum was available to South Jersey and Northeast. The City argues that if such a forum were available, the City's regulations were constitutionally permissible restrictions since the other two prongs of the time, place, and manner standard: 1) that no distinctions be drawn according to either the content or subject matter of the

speech to be regulated and 2) that a significant governmental interest be served had been met.

The Court of Appeals ruled in favor of the City, finding that the City had to show that there was an adequate alternative forum available for South Jersey and Northeast but did not have to show that its regulations were the least restrictive alternative (A-16). The City now requests that this Court review the Court of Appeals' ruling in its favor on this issue. The City objects to the following statement in the Court of Appeals opinion:

> In determining whether an 'adequate alternative forum' exists in the present case, the district court may wish to consider factors such as the size of the audience, the prestige of an alternate parade, and the relative ability of another audience to appreciate the plaintiffs' expressive message. *Of course no one of these factors is necessarily determinative.*(A-16) (emphasis added)

This language which the City finds objectionable is not part of the Court's remand order. The City is seeking Supreme Court review of explanatory language or statements which can be considered to be dicta and which are not essential to the result reached. The Supreme Court reviews judgments, not statements in opinions. *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956).

Furthermore, the Court of Appeals' statement concerning what the District Court may wish to consider is in accordance with the decisions of the Supreme Court of the United States. In determining whether or not an adequate alternative forum is available for the expressive conduct limited or forbidden by the regulation or statute being challenged, the Supreme Court has compared the effectiveness of the alternative forum to the effectiveness of the forum which is being restricted or closed and has also evaluated the effectiveness of the alternative forum by examining its cost and its effectiveness in com-

municating the desired message to the intended audience. The Supreme Court followed this approach in *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977). In that case the plaintiffs challenged a Willingboro ordinance which banned "For Sale" signs in Willingboro. In determining whether or not the ordinance left open ample alternative channels for communication the Court stated,

> Although in theory sellers remain free to employ a number of different alternatives, in practice realty is not marketed through leaflets, sound trucks, demonstrations, or the like. The options to which sellers realistically are relegated — primarily newspaper advertising and listing with real estate agents — involve more costs and less autonomy than 'For Sale' signs; (citations omitted) are less likely to reach persons not deliberately seeking sales information (citations omitted); and may be less effective media for communicating the message that is conveyed by a 'For Sale' sign in front of the house to be sold, (citations omitted). The alternatives, then, are far from satisfactory.

Based on this analysis the Court found that the Willingboro law did not meet the requirements of a valid time, place, and manner regulation since it failed to leave open adequate channels for communication by the plaintiffs. In reaching this result the Supreme Court considered the audience to be reached, the effectiveness of the alternative forum as compared to the forum which the plaintiffs sought to use in communicating its message, and the cost of the alternative forum. The Court of Appeals in stating that the District Court may wish to consider the size of the audience of an alternate parade, the prestige of an alternative parade, and the relative ability of another audience to appreciate the Respondents' expressive message has employed the same analytical structure as the Supreme Court in *Linmark*.

In *Metromedia, Inc. et al v. City of San Diego et al* 453 U.S. 490 (1981) (plurality opinion) the United States Supreme Court used the same approach as the Court of Appeals in this case in invalidating restrictions on billboards and finding that the restrictions were not valid time, place and manner restrictions because there were no adequate alternative channels available for communication. In reaching this conclusion, the Court relied upon the stipulation of the parties that

> . . . many businesses, politicians and other persons rely upon outdoor advertising because other forms of advertising are insufficient, inappropriate and prohibitively expensive *Id.* at 516.

In *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981) the Supreme Court invalidated a prohibition against live entertainment in a township as violating the First Amendment based in part upon the absence of an adequate alternative forum. The Court stated,

> Furthermore, there is no evidence in the record to support the proposition that the kind of entertainment appellants wish to provide is available in reasonably nearby areas. The courts below made no such findings, and at least in their absence the ordinance excluding live entertainment cannot constitutionally be applied to appellants so as to criminalize the activities for which they have been fined. *Id.* at 76.

If the City's analysis were adopted, the Court would merely have asked whether or not the ordinance prohibited live entertainment outside the township. If it did not, and it did not, then whether or not live entertainment was available and the kind of entertainment that was available would not affect the availability of an adequate alternative forum. The standard set forth by the City would radically change the nature of the adequate alternative forum test used by the Supreme Court.

In *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1981) the Supreme Court in determining whether a Minnesota State Fair regulation, which prohibited solicitation of funds and distribution of literature at the fair except from assigned booths, met the standards of a time, place, and manner regulation followed the approach used in *Linmark Associates, Inc. v. Township of Willingboro*, 431, 85 (1977) and in *Metromedia Inc. et al. v. City of San Diego et al.*, 453 U.S. 490 (1981). In *Heffron* the Court found that the limitation on solicitation of funds and distribution of literature at the fair did not prevent the plaintiffs from soliciting and distributing literature outside the fair. The plaintiffs did not contend that an adequate audience did not exist outside the fair, or that the cost of soliciting and distributing literature outside the fair was prohibitive or substantially greater than soliciting and distributing literature at the fair, or that soliciting and distributing literature outside the fair was ineffective. In addition the Court specifically found that the regulations permitted adequate opportunities for soliciting at the fair itself. According to the Court,

> . . . nor does it deny that organization the right to conduct any desired activity at some point within the forum. Its members may mingle with the crowd and orally propagate their views. The organization may also arrange for a booth and distribute and sell literature and solicit funds from that location on the fairgrounds itself. . . . Considering the limited functions of the Fair and the combined area within which it operates, we are unwilling to say that Rule 6.05 does not provide ISKON and other organizations with an adequate means to sell and solicit on the fairground. The First Amendment protects the right of every citizen to 'reach the minds of willing listeners and to do so there must be opportunity to win their attention.' (citation omitted) Rule 6.05

> does not unnecessarily limit that right within the fairgrounds. *Id.* 654 and 655.

In this case South Jersey and Northeast have no opportunity to participate in the Mummers Parade. No other forum exists for South Jersey and Northeast to engage in the style of dancing and playing of music known as Mummery.

In determining the existence of an adequate alternative forum, the only approach available which insures the objectives of First Amendment freedom of expression is to examine the effectiveness of the potential alternative forums in delivering the desired message to the intended audience. Not to do this would result in the adequate alternative forum standard being meaningless, since as long as some expressive means were available the test would be met even if those means were so time consuming as to be without value, prohibitive in cost, or ineffective in communicating the message to the intended audience. Thus the government under the guise of regulation could prohibit or severely impede protected First Amendment expression.

The City contends that the Court of Appeals, in the portion of its opinion indicating what the District Court may wish to consider on remand in determining whether an adequate alternative forum is available, is ruling that if the forum sought to be used is unique, then as a matter of law there is no adequate alternative forum. The Court of Appeals has not stated this at all. It does not mention the uniqueness of the Mummers Parade as being a factor to be considered on remand. The City is creating conditions which it does not have to meet and then contending that these conditions violate the decisions of this Court.

The City's contention that it cannot limit or restrict the parade is untrue. In this case restrictions are permissible if they meet the requirement of a time, place, and manner regulation. In determining the constitutionality

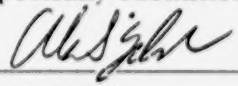
of a time, place, and manner regulation, this Court has balanced the interests of government in supervising the use of the public streets with the right of the people to utilize the public streets for First Amendment purposes. The City seeks to upset that balance. According to the City, any time it cannot meet the requirements of a time, place, and manner regulation its restrictions must prevail for the sake of administrative convenience.

CONCLUSION

The Court of Appeals remanded this case to the District Court for fact finding as to whether or not an adequate alternative forum exists for Respondents and whether or not Petitioners based their prohibition upon Respondents' participation in the parade upon improper motives. A remand order for fact finding provides no basis for a writ of certiorari since the case is not ripe for review. The District Court may find that there is an adequate alternative forum or may find that the prohibition was based upon improper motivation. Either finding would obviate any need for the review that the Petitioners now seek. The Petitioners are requesting that a Writ of Certiorari be granted to consider a hypothetical question which may or may not arise. No conflict among the circuits exists as to the adequate alternative forum standard and it presents no novel or important issue. The Court of Appeals applied settled and established concepts set forth by the United States Supreme Court in several recent decisions in its discussion of an adequate alternative forum.

For the reasons stated above, a Writ of Certiorari should not be issued.

Respectfully submitted,



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